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 GIGANEWS, INC., and
 9 LIVEWIRE SERVICES, INC.

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

13 PERFECT 10, INC., a California
 corporation,

14 Plaintiff,

15 v.

16 GIGANEWS, INC., a Texas Corporation;
 17 LIVEWIRE SERVICES, INC., a Nevada
 corporation; and DOES 1 through 100,
 18 inclusive,

19 Defendants.

20 GIGANEWS, INC., a Texas Corporation;
 21 LIVEWIRE SERVICES, INC., a Nevada
 Corporation,

22 Counterclaimants,

23 v.

24 PERFECT 10, INC., a California
 25 Corporation,

26 Counterdefendant.

Case No.: 11-cv-07098-AB (SHx)

DISCOVERY MATTER
Before Hon. Stephen J. Hillman

**DEFENDANTS GIGANEWS, INC.
 AND LIVEWIRE SERVICES,
 INC.'S REVISED RESPONSE TO
 THE COURT'S REQUEST
 DURING THE AUGUST 25, 2014
 HEARING REGARDING
 PERFECT 10'S MOTION FOR
 SANCTIONS**

Date: August 25, 2014
 Time: 2:00 P.M.
 Courtroom: Telephonic Hearing

Discovery Cut-off: June 30, 2014
 Pretrial Conference: January 19, 2015
 Trial Date: January 27, 2015

Pursuant to the Court's request during the August 25, 2014 hearing regarding Perfect 10's motion for sanctions and the Court clerk's request on September 2, 2014, Defendants Giganews, Inc. and Livewire Services, Inc. hereby identify *and submit* the documents that Defendants have filed in support of their positions regarding the burden of identifying the "posters" of Usenet messages that Perfect 10 has identified as containing infringing material.

I. Materials Filed in Connection with Plaintiff Perfect 10, Inc.'s Motion for Evidentiary Sanctions Against Defendant Giganews, Inc. (Dkt. 260)

Defendants addressed the process for determining the identity of the "posters" of Usenet messages and related issues as follows:

- A. Dkt. 279 [Declaration of Kathleen Lu in Support of Defendants' Position Regarding Joint Stipulation as to Perfect 10's Motion for Sanctions, including Exhibits A through J, filed under seal] at ¶¶3, 9-12 (describing the multi-step process for determining identifying information and Giganews's efforts to explain the process to Perfect 10). *See* the Declaration of Joseph S. Belichick in Support of Defendants Giganews, Inc. and Livewire Services, Inc.'s Revised Response to the Court Request During the August 25, 2014 Hearing Regarding Perfect 10's Motion for Sanctions ("Belichick Decl.") at ¶2, Ex. 1.
 - Ex. B [Apr. 9, 2014 Bridges letter to Perfect 10] at 3-5 (explaining the steps involved in matching a pseudonym from a message header to a customer account). *Id.* at ¶3, Ex. 2.
 - Ex. D [DMCA database entry detailing the removal of 53 messages] at 3 (highlighting header fields used in performing multi-step process to determine customer account information), at 30-33 (identifying decrypted X-Trace data, including Giganews account number). *Id.* at ¶4, Ex. 3.

- 1 ▪ Ex. E [Customer account information] (showing identifying
- 2 information for customer with Giganews account number referred
- 3 to above); *see also* Ex. F [Re-produced version of customer account
- 4 information] (same). Belichick Decl. at ¶5, Ex. 4.
- 5 ▪ **Ex. I [Transcript of March 21, 2014 Deposition of Philip**
- 6 **Molter] at 105:8-23; 111:9-21; 169:14-170:3 (describing the**
- 7 **“quickest way” to get a customer information for a particular**
- 8 **message, which involves decoding an X-Trace header from**
- 9 **messages retrieved by Message-ID to get a customer account**
- 10 **information that in turn may be used to look up customer**
- 11 **information related to such account.)). *Id.* at ¶6, Ex. 5.**

12 **B.** *See also* Dkt. 280 [Defendants’ Portions of Joint Stipulation on

13 Plaintiff Perfect 10 Inc.’s Motion for Evidentiary Sanctions Against

14 Defendant Giganews, Inc., filed under seal]:

- 15 ▪ at 5-7 (discussing Giganews’ production of three relevant databases
- 16 and instructions for how to derive identifying information from
- 17 those databases);
- 18 ▪ **at 8-18 (reproducing Giganews’ verified responses¹ to**
- 19 **Interrogatory Nos. 1-3 that described in detail the multi-step**
- 20 **process “to identify a person who posts a message on the**
- 21 **Usenet” from Message ID to Subscribed ID);**
- 22 ▪ at 24-29 (detailing the multi-step process for determining
- 23 identifying information using the three databases produced by
- 24 Giganews); and

27 ¹ Giganews’s Chief Financial Officer, Shane Menking, verified all of Giganews’s

28 responses to Perfect 10’s interrogatories.

- at 67-71 (discussing Mr. Molter’s deposition testimony regarding how to determine identifying information). *See* Belichick Decl. at ¶7, Ex. 6.

C. *See also* Dkt. 276 [Defendants’ Supplemental Memorandum on Plaintiff Perfect 10, Inc.’s Motion for Evidentiary Sanctions]:

- at 1, 3-5 (discussing the process of deriving identifying information for customers and how the burdens of doing so would be the same for both Perfect 10 and Giganews). *Id.* at ¶8, Ex. 7.

The cited portions of these materials described generally how Perfect 10 may obtain identifying information about “posters” from the documents that Giganews identified in its responses to Interrogatory Nos. 1-3 pursuant to Fed. R. Civ. P. 33(d).

II. **Materials Filed in Connection with Perfect 10, Inc.’s Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(b) for Failure to Comply with a Court Order (Dkt. 344)**

Defendant filed additional information about determining the identity of the “posters” as follows:

- A. Dkt. 344-6 [Declaration of Joseph Belichick in Support of Defendants’ Opposition to Perfect 10, Inc.’s July 28, 2014 Motion for Sanctions] at ¶¶3-4 (detailing offers of technical assistance by Giganews and Perfect 10’s failure to respond or otherwise seek assistance). *Id.* at ¶9, Ex. 8.
 - Dkt. 344-7 [Ex. A – July 11, 2014 Belichick letter to Perfect 10] at 1-3 (detailing Giganews’ offers of technical assistance and describing the process for decrypting X-Trace information to identify customers). *Id.* at ¶10, Ex. 9.
 - Dkt. 344-8 [Ex. B – Transcript of July 18, 2014 Conference] at 1-3, 7 (reiterating the process for decrypting X-Trace information to identify customer). *Id.* at ¶11, Ex. 10.

1 **B.** *See also* Dkt. 344-1 [Defendants’ Portions of the Joint Stipulation on
2 Plaintiff Perfect 10, Inc.’s July 28, 2014 Motion for Sanctions]:

- 3 ▪ at 4-6 (demonstrating that Giganews had furnished all technical
4 assistance necessary to instruct Perfect 10 on how to cross-
5 reference the X-Trace header against the databases produced by
6 Giganews to obtain the identity of posters; and
- 7 ▪ at 12-21 (clarifying that Defendants located user account
8 information by cross-referencing the *account number* found in each
9 decrypted X-Trace header with corresponding account records, not
10 by cross referencing fictitious email addresses).² *See* Belichick
11 Decl. at ¶12, Ex. 11.

12 The cited portions of these materials established that Giganews provided technical
13 guidance to Perfect 10 about how to use message data to derive user-identifying
14 information and made itself available to Perfect 10 to furnish further assistance.

15 **III. CONCLUSION**

16 These materials show that, on several occasions, Defendants provided
17 declarations (or verified interrogatory responses as part of a Joint Stipulation)
18 identifying the burdens on Giganews of extracting the information that Perfect 10
19 seeks. Defendants attempted to work with Perfect 10 on these issues several times,
20 but Perfect 10 would not participate in discussions in good faith. Defendants now
21 reiterate their willingness to provide the information to Perfect 10 but only if
22 Perfect 10 bears the costs associated with the effort in accordance with the Court’s
23 previous order (Dkt. 295) and the cost schedule that Defendants previously
24 provided (Dkt 362), payable in advance. *See* Belichick Decl. at ¶14, Ex. 13; at ¶15,

25 ² *Compare* Dkt. 344-3 [Zada Decl.] at ¶6 (speculating that he “cannot think of any
26 way that Giganews could have known that the persons listed in
27 GIGANEWS00000336-368 correspond to a list of email addresses provided by
28 Perfect 10 unless Giganews had a way of readily matching the purported email
 address to the real name of the uploader.”). *See* Belichick Decl. at ¶13, Ex. 12.

1 Ex. 14, respectively.

2 Dated: September 3, 2014

FENWICK & WEST LLP

3 By: /s/ Joseph S. Belichick
4 Joseph S. Belichick

5 Attorneys for Defendants
6 GIGANEWS, INC., and
7 LIVEWIRE SERVICES, INC.
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